UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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MICHAEL SANCHEZ, JONATHAN GALESCU, RICHARD ORTIZ, AND INT'L UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,

Case No. 32-CA-197020 et al.

and

TESLA, INC.

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**AMICUS CURIAE BRIEF OF**
**SERVICE EMPLOYEES INTERNATIONAL UNION**

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## INTRODUCTION

The Board has invited interested amici to submit briefs on whether *Stabilus, Inc.*, 355 NLRB 836 (2010), sets forth the correct standard to apply when an employer maintains and consistently enforces a nondiscriminatory uniform policy that implicitly allows employees to wear union insignia (buttons, pins, stickers, etc.) on their uniforms. The Service Employees International Union ("SEIU") submits that the Board should not reach this question because the issue is not properly presented in this case. If the Board nevertheless insists on issuing what amounts to an advisory opinion, the Board should hold that, absent special circumstances, an employer may not use a dress code to prohibit union insignia or attire, and that where an employer requires employees to wear company-issued uniforms, employees have a presumptive right to wear union insignia on their uniforms. Further, the Board should recognize that when an employer directs an employee to remove union insignia or attire pursuant to a dress code, employees will not "implicitly" understand that they may wear other forms of union insignia and attire.

## INTEREST OF THE AMICUS

Amicus Curiae SEIU is a labor union with more than two million members in the United States (including in Puerto Rico) and Canada. More than half of SEIU's members work in the healthcare industry, including as doctors, nurses, nursing assistants, technicians, therapists, home care providers, administrative staff, janitorial workers, and food service staff. SEIU is also one of the largest unions of public service employees, representing local and state government workers, including public school employees, bus drivers, and childcare providers.[1] SEIU represents

[1] These public sector employees have a direct interest in the outcome of this and other cases decided by the Board because state agencies often look to the decisions of the NLRB as persuasive authority in interpreting analogous state laws.

workers in the property service industries as well; SEIU members clean, maintain, and provide security for commercial office buildings, co-ops, and apartment buildings, as well as public facilities like theaters, stadiums, and airports.

SEIU's members have a strong interest in the outcome of this case because many SEIU members are required to wear uniforms at work. In addition, the right to wear union insignia is a basic element of the protections offered by Section 7 of the Act, and wearing union attire and insignia is an important component of both organizing and contract campaigns.

## A. The Question Raised in the Invitation to File Amicus Briefs Is Not Presented in this Case.

The Board has invited interested amici to address whether *Stabilus, Inc.,* 355 NLRB 836 (2010), provides the correct standard to apply "when an employer maintains and consistently enforces a nondiscriminatory uniform policy that implicitly allows employees to wear union insignia (buttons, pins, stickers, etc.) on their uniforms." But in the case at hand there was no uniform policy at all; the policy that was applied was not applied in a nondiscriminatory manner; and union insignia were not implicitly allowed.

It is a misnomer to describe the Tesla policy at issue as a "uniform" policy. Workers were not required to wear a company-issued uniform. Instead, with their supervisor's permission, workers were allowed to wear either a cotton shirt with the company logo or an all-black shirt. In addition, workers chose their own black pants, with the only limitation being that the pants could not have buttons, rivets, or exposed zippers.

The policy also was not consistently applied. It was up to each individual supervisor to decide whether employees had to wear shirts with the company logo and, at least prior to August 2017, Tesla interpreted its policy as allowing for union t-shirts. This is essentially the opposite of a consistent policy.

Next, nothing in the record suggests that the GA workers were allowed to wear buttons or pins of any kind. In fact, since the policy bars workers from wearing pants with buttons, rivets, or exposed zippers, and the Employer has attempted to justify the policy by raising concerns about mutilation of its vehicles, it is almost certain that the Employer would have barred workers from wearing union pins or buttons.

The Board should decide the issues actually presented, and not use this case as a vehicle to issue an advisory opinion about an issue not presented. The Employer did not "consistently enforce a nondiscriminatory uniform policy," and the policy did not implicitly allow workers to wear union buttons or pins. Thus, this case is not an appropriate vehicle for the Board to address the questions raised in the invitation to file briefs.

**B. The Board Should Not Overrule *Stabilus*, and If It Does Reach the Issue, Should Clarify the Difference Between Dress Codes and Uniform Requirements.**

In *Stabilus*, the Board held that "[a]n employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia." *Stabilus*, 355 NLRB at 838. That holding is consistent with the approach the Board has taken to the wearing of union insignia since the earliest days of the Act. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 (1945), the Supreme Court agreed that "prohibitions against the wearing of insignia must fall as interferences with union organization." Since then, the Board has always required employers to establish "special circumstances" to justify prohibitions on wearing union insignia.

If the Board does reach this issue, it should start by differentiating between employers that merely enforce dress codes and employers that require workers to wear actual uniforms. In the dress code context, amicus accepts the general proposition that if an employer requires workers to wear a particular *type* of clothing (although not an official uniform), workers do not

have a Section 7 right to override that decision. For instance, if a hospital employer requires certain workers to wear scrubs, workers do not have a Section 7 right to wear union t-shirts instead of scrubs. But once the dress code is complied with, the hospital employer should be required to establish "special circumstances" to justify any prohibition on union insignia that fits within the code.

For example, if the hospital employer wants to prohibit workers from wearing scrubs with a union insignia, it must justify that prohibition with "special circumstances." The workers in that case would be complying with the employer's scrubs requirement, and the employer must show some additional circumstance that justifies the prohibition of union insignia in order not to run afoul of the Act's protections. Similarly, if an employer's dress code requires workers to wear purple ties, the employer should be required to establish "special circumstances" if it seeks to prohibit workers from wearing purple ties containing a union insignia.

Applying the same principle to the instant case, an employer that allows workers to wear black t-shirts should be required to establish "special circumstances" to deny workers the right to wear black t-shirts with a union insignia. The specific facts of this case help to illustrate why that is so. Tesla offered two different rationales for its dress code: visual identification of workers and eliminating risk of vehicle mutilation. Since both those goals could be achieved while also permitting workers to wear black union t-shirts, Tesla's interference with employees' union rights was unjustified and could only invite the inference among employees and others that it was targeting the union rather than asserting a legitimate interest. Thus, the ALJ properly found that neither of Tesla's dress-code rationales provided the "special circumstances" that would justify prohibiting workers from wearing UAW t-shirts.

A somewhat different issue arises where employees are required to wear a company-issued uniform. There are many jobs where wearing a uniform is part of the job – security officers, doorpersons, and fast food workers are expected to wear a company-issued uniform at all times. Provided the employer has not implemented the uniform requirement in response to worker organizing, the uniform policy may be enforced, and workers may lawfully be prohibited from substituting a union-issued t-shirt for their uniform shirt.

But, uniform requirements do not completely override workers' right to wear union insignia. As the Board has repeatedly held, workers have a presumptive right to wear union pins, buttons, ribbons, etc., on their uniforms. *See, e.g. In-N-Out Burger, Inc.*, 365 NLRB No. 39, slip op. at 1, n.2 (2017), *enf'd.* 894 F.3d 707 (5th Cir. 2018) *cert. denied*, 139 S.Ct. 1259 (2019) (employer violated Section 8(a)(1) by prohibiting workers from wearing "Fight for Fifteen" buttons). Also, where appropriate, workers have a right to wear visible union t-shirts *under* their uniform shirts. In *Stabilus*, "one acceptable style of company shirt buttoned completely down the front and [the employer] permitted employees to wear it unbuttoned with T-shirts underneath displaying various messages." *Stabilus*, 355 NLRB at 837. This was one of the reasons why the Board held that the employer's uniform policy did not justify its directive that employees remove their union t-shirts. Of course, the uniform issue is not presented here because Tesla did not require workers to wear a particular uniform.

The Supreme Court has recognized that when it comes to balancing the interests of employers against the Section 7 rights of workers, "[i]t is not surprising or unnatural that [an employer's] assessment of the need for a particular practice might overcompensate its goals, and give too little weight to employee organizational interests," and thus, the Board must "strik[e] that balance to effectuate national labor policy." *Beth Israel Hospital v. NLRB*, 437 U.S. 483,

501 (1978). If the Board shirks its responsibility to engage in this balancing, the inevitable result is that employers will give insufficient weight to workers' Section 7 rights. Thus, if an employer tries to use its dress code to interfere with the right to wear union insignia, the Board must step in to determine whether special circumstances justify the restriction.

### C. There Are Good Reasons Why the Board Has Consistently Held That Allowing Workers to Wear Some Form of Union Insignia is Not a Defense to a Prohibition on Other Forms of Union Insignia.

Since Section 7 rights belong to workers, it should generally be up to the worker to decide which of those rights to exercise when. The corresponding principle is that when an employer infringes on workers' Section 7 rights, it is no defense that the employer allows other forms of Section 7 activity. For instance, an employer that prohibits workers from distributing union leaflets in non-work areas commits an unfair labor practice even if allows workers to talk about the union in those same areas. Section 7 is not a menu from which employers can pick and choose.

The Board has long applied this same principle to union insignia. For example, in *Malta Construction Co.*, 276 NLRB 1494 (1985) and *Northeast Industrial Service Co.*, 320 NLRB 977 (1996), the Board held that the employers violated the Act when they prohibited workers from wearing union stickers on company-issued hard hats even though in both cases the employers allowed workers to wear other forms of union insignia. Similarly, in *Holladay Park Hospital*, 262 NLRB 278 (1978), the Board held that an employer committed an unfair labor practice when it barred employees from wearing yellow ribbons to show support for the union during contract negotiations. The Board noted that it was "irrelevant" that the employer had permitted workers to wear another union insignia. *Id.* at 279.

Allowing workers to wear union stickers or even hats is not the equivalent of allowing workers to wear union t-shirts. Stickers worn on soft surfaces like t-shirts must be constantly replaced, whereas a t-shirt can be washed and worn hundreds of times. And while hats can be worn repeatedly, not everyone is comfortable wearing a hat at work. Many people still consider wearing a hat indoors a breach of etiquette,[2] or have difficulty finding a hat that fits comfortably, or are reluctant to wear hats for fear of developing the dreaded "hat hair."[3] Again, it is not for the Employer to decide which forms of Section 7 expression are permitted or prohibited.

In this case, the Board should find that Tesla violated the Act by prohibiting the GA workers from wearing UAW t-shirts even if it allowed some workers to wear union stickers and hats. It need not, and indeed cannot, go further.

### D. Where an Employer Bans a Particular Form of Union Insignia, Workers Will Not Implicitly Understand That All Other Forms of Union Insignia Are Acceptable.

Since Tesla has not established special circumstances that would justify prohibiting workers from wearing UAW t-shirts, the Board should not reach the issue of how to handle cases where an employer *does* establish special circumstances to bar a particular article of union insignia or attire. If the Board nonetheless reaches that issue, even though it is not presented, the Board should hold that if an employer directs employees to remove union insignia or attire, but the employer does not intend to ban all union insignia and attire, the employer should say so.

Here, the employer is arguing that because it allowed some workers to wear union stickers, any employee who was told to remove his union t-shirt would have known that it was acceptable to wear a union sticker or hat in its place. But, at least one supervisor told workers

[2] *See, e.g.*, https://emilypost.com/advice/hats-off-hat-etiquette-for-everyone
[3] *See, e.g.*, Stephen J. Praetorius, "How to Get Rid of Hat Hair, Fast," GQ (Oct. 8, 2015), https://www.gq.com/story/how-to-get-rid-of-hat-hair

that they were not allowed to distribute union stickers, ALJD at 26, and the Employer has not pointed to any evidence in the record that employees who were told to remove union t-shirts knew they could substitute union stickers or hats. There is no reason to *assume* that workers who were ordered to remove their union t-shirts would confidently conclude they could wear union hats. In fact, the opposite is likely true. Since the only thing different about the UAW t-shirts was the union insignia, it would be logical for workers to assume that the union insignia itself was the problem.

When a worker hears that his co-worker was sent home for wearing a union t-shirt, he might reasonably be reluctant to try his luck by donning a union hat. Even if a worker notices that some co-workers have worn union hats, the worker cannot be expected to know that she would not be disciplined for wearing a union hat. When an employer does not discipline a worker for wearing a union hat or sticker, the non-discipline often fails to send a clear message because (1) the supervisor may not have noticed the union insignia; (2) rules are often enforced selectively; and (3) discipline is rarely meted out in public, so co-workers may not know whether a fellow employee was disciplined. It is true that in some cases where a brave worker wears union insignia every day, co-workers at some point may conclude that they too will be allowed to wear union insignia, but Section 7 rights should not depend on one worker's bravery, and there is no justification for requiring workers to run that kind of risk. There is also no legitimate reason why an employer should not provide the needed guidance as to what *is* allowed.

Requiring employers to be clear about their rules serves another purpose as well in that it avoids unnecessary litigation. Prior Board cases show that banning one type of union insignia while only "implicitly" allowing others leads to confusion. In *World Color (USA) Corp.*, 360 NLRB 227 (2014), the Board found that the employer violated the Act by prohibiting workers

from wearing baseball caps "bearing union insignia." When the case got to the D.C. Circuit, the employer argued that there was no such prohibition, and employees were free to wear attachments with union insignia on their caps. *World Color (USA) Corp. v. NLRB*, 776 F.3d 17, 20 (D.C. Cir. 2015). It is possible that the entire case would have been avoided if only the employer had expressly told workers that they were free to wear union buttons on their hats.

If an employer has a legitimate reason to ban on a particular type of union insignia, the employer ought to notify employees what other forms of union insignia are be allowed. Otherwise, the employer will have no one to blame but itself if the Board finds that the employer's ban on union insignia was overbroad.

## CONCLUSION

Since the issue raised in the invitation for briefs is not presented in this case, the Board should not reach it. If the Board nonetheless does reach the issue, it should reaffirm *Stabilus*, clarify the difference between dress codes and uniform requirements, and further hold that when an employer bans a particular form of union insignia, workers cannot be expected to "implicitly" understand what other forms of union insignia are allowed.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Nicole Berner, hereby certify that the true and correct copy of the foregoing Amicus Brief in Case No. 32-CA-197020 et al. was e-filed with the NLRB's Executive Secretary and served via e-mail on the following parties or counsel this 22nd day of March 2021:

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